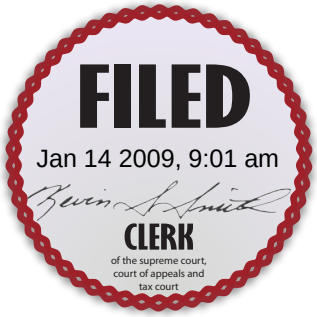

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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL G. ALBRECHT,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A05-0803-PC-182
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant W. Hawkins, Judge
Cause No. 49G05-9706-PC-80729

January 14, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Michael Albrecht, an inmate at Pendleton Correctional Facility, appeals the post-conviction court's denial of his petition for post-conviction relief ("PCR"). In his pro se appeal, Albrecht raises three issues, which we restate as: (1) whether the State knowingly elicited perjured testimony; (2) whether the post-conviction court erred when it denied his request for a new trial on the basis of newly discovered evidence; and (3) whether his sentence is inappropriate. Concluding that the State did not elicit perjured testimony, the evidence presented by Albrecht does not meet the standard for a new trial based on newly discovered evidence, and Albrecht's sentence is not inappropriate, we affirm.

Facts and Procedural History

The facts pertinent to this decision as laid out by our supreme court on direct appeal are:

> Cynthia and Michael Albrecht worked for different owners participating in the Championship Auto Racing Teams (CART) series. During the 1992 CART season[,] the Albrechts began experiencing marital difficulties. As a result, Cynthia moved out of the marital home and thereafter filed for divorce. On October 26, 1992, one day before the divorce was scheduled to become final, Cynthia returned home from the final CART race of the season. She had made plans to meet a male friend in Florida later that week. However, after making a telephone call at approximately 9:30 p.m., Cynthia disappeared. Her naked and decapitated body was discovered several weeks later in a field in Northern Indiana.
>
> On June 4, 1997, after a five-year criminal investigation, the State charged Albrecht with Cynthia's murder. One of the State's key witnesses at trial was William Filter, a long-time friend of Michael Albrecht. He had initially provided Albrecht with an alibi for the evening Cynthia disappeared. However, Filter later changed his story and told police that Albrecht had planned to murder Cynthia after their marriage soured. The plan included decapitating Cynthia to make identification of her body difficult. A jury convicted Albrecht of murder, and the trial court sentenced him to sixty years in prison.

Albrecht v. State, 737 N.E.2d 719, 723 (Ind. 2000).

Albrecht appealed his conviction raising six issues, which our supreme court restated as:

> (1) did the State fail to preserve and provide the defense with exculpatory evidence; (2) did the trial court improperly exclude evidence related to Albrecht's defense; (3) did the trial court improperly admit evidence offered by the State; (4) was Albrecht tried by a fair and impartial jury; (5) did the trial court err in its instructions to the jury; and (6) was the evidence sufficient to support the conviction?

Id. Our supreme court affirmed Albrecht's conviction on October 19, 2000. Id. at 734.

Following his unsuccessful appeal, Albrecht filed a petition for PCR on December 31, 2001. Albrecht amended his petition for PCR on August 25, 2006, arguing: that the State knowingly elicited perjured testimony from FBI Special Agent Daniel Craft, which interfered with his ability to present his alibi defense; that his sentence violated the United States Constitution because a jury did not find the aggravating circumstances used to enhance his sentence; that he should receive a new trial on the basis of newly discovered evidence of Special Agent Craft's dishonesty; and that his initial trial counsel had a conflict of interest. The post-conviction court held a hearing on the petition for PCR on October 25, 2006.

After considering proposed findings of fact and conclusions of law from both parties, the post-conviction court denied Albrecht's petition for PCR on February 14, 2008. The post-conviction court found that

> [Albrecht's] allegation that his sentence was improperly aggravated in violation of Apprendi v. New Jersey, 530 U.S. 466 (2000) and Blakely v. State, 542 U.S. 296 (2004), must fail. In Smiley v. State, 823 N.E.2d 679 (Ind. 2000), [our supreme court] noted, "The fundamental error doctrine

> will not, as caselaw holds, be available to attempt retroactive application of Blakely through post conviction relief."
>
> * * *
>
> [Albrecht's] cross-examination of Craft at trial was thorough and focused on discrepancies in his testimony and his failure to locate his notes. Further evidence on Craft's lack of veracity would be cumulative.
>
> Further evidence of Craft's lack of veracity would be merely impeachment.
>
> [Albrecht] has failed to demonstrate that additional evidence of Craft's lack of veracity would be available at retrial. [Albrecht] relies on news articles and published opinions, but has not shown what he would actually present as evidence were he to receive a new trial.
>
> The court is not convinced, having read the multi-volume Record of Proceedings, that a new trial would produce a different result.
>
> The law is with the State and against the [Albrecht].

Brief of the Appellant at 31-32. Albrecht now appeals.

Discussion and Decision

I. Standard of Review

To obtain relief, a petitioner in a post-conviction proceeding bears the burden of establishing his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). We accept the post-conviction court's findings of fact unless they are clearly erroneous, but we do not defer to the post-conviction court's conclusions of law. Martin v. State, 740 N.E.2d 137, 139 (Ind. Ct. App. 2000). Moreover, a petitioner who appeals a denial of a petition for PCR, appeals from a negative judgment and therefore must establish "that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court." Stevens v. State, 770 N.E.2d 739, 745 (Ind. 2002).

II. Use of Perjured Testimony

The State violates a defendant's due process of law rights when it uses perjured testimony in order to procure a conviction. Klagiss v. State, 585 N.E.2d 674, 682 (Ind. Ct. App. 1992), trans. denied. In order to succeed on a claim of knowing use of perjured testimony, the defendant must establish that the State knew the testimony to be false, and either solicited such testimony or allowed the testimony to go uncorrected. Wallace v. State, 474 N.E.2d 1006, 1008 (Ind. 1985). "However, mere inconsistencies in the testimony of a witness do not lead to the conclusion that the witness committed perjury", and "[t]he jury is given the responsibility of resolving any inconsistencies which might exist." Klagiss, 585 N.E.2d at 682 (citations omitted).

Much of Albrecht's argument consists of instances where Special Agent Craft's honesty and credibility have been questioned by other courts in cases unrelated to this one. At the PCR hearing, Albrecht also presented testimony and affidavits from his family members contradicting the testimony of Special Agent Craft and pointed out inconsistencies between Special Agent Craft's trial testimony and his investigative summaries. However, Albrecht provides little cogent reasoning and no citations to authority to support his argument.

Indiana Appellate Rule 46(A)(8)(a) requires that all arguments be supported by cogent reasoning and citation to authority. An issue that is not supported by cogent reasoning and citation to supporting authority is waived. Hay v. Hay, 885 N.E.2d 21, 23 n.2 (Ind. Ct. App. 2008). Waiver notwithstanding, Albrecht has failed to present any direct evidence proving that Special Agent Craft committed perjury during his jury trial

or that the State knew Special Agent Craft's testimony to be false. Albrecht has only pointed out inconsistencies in Special Agent Craft's testimony. It is the responsibility of the jury, and not this court, to resolve such inconsistencies. Therefore, the post-conviction court did not err when it denied Albrecht relief on his claim of the State's knowing use of perjured testimony.

III. Newly Discovered Evidence

> [N]ew evidence will mandate a new trial only when the defendant demonstrates that: (1) the evidence has been discovered since the trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced upon a retrial of the case; and (9) it will probably produce a different result at trial.

Taylor v. State, 840 N.E.2d 324, 329-30 (Ind. 2006) (quoting Carter v. State, 738 N.E.2d 665, 671 (Ind. 2000)). "[N]ewly discovered evidence should be received with great caution and the alleged new evidence carefully scrutinized." Id. (quoting Reed v. State, 508 N.E.2d 4, 6 (Ind. 1987)). The decision to grant or deny a request for a new trial based on newly discovered evidence rests with the post-conviction court, and we will not disturb that decision absent a showing of abuse of discretion. Lottie v. State, 444 N.E.2d 306, 308 (Ind. 1983).

Albrecht argues that he should be granted a new trial on the basis of evidence calling into question Special Agent Craft's honesty and credibility. While Albrecht presents considerable evidence of Special Agent Craft's dishonesty in other cases, he presents no new evidence that Special Agent Craft committed misconduct in assisting

with this investigation or lied in his testimony during this trial. At best, then, Albrecht's newly discovered evidence is merely impeaching.

Additionally, Albrecht thoroughly cross-examined Special Agent Craft during the trial. Specifically, Albrecht questioned Special Agent Craft regarding the destruction of his handwritten investigation notes and inconsistencies between Special Agent Craft's testimony and his interview summaries. Therefore, the issue of the reliability of Special Agent Craft's testimony was put before the jury, and further evidence, especially evidence unrelated to this case, would be cumulative.

Finally, the testimony of Special Agent Craft was not critical to the State's case, and, thus, the inclusion of the newly discovered evidence would not be likely to produce a different result at a new trial. Our supreme court, in affirming Albrecht's conviction, pointed to the testimony of William Filter, who admitted his role in fabricating an alibi; Antonio Ferrari, who testified that Albrecht contacted him about hiring someone to do something permanent to Cynthia; Albrecht's brother, who testified that Albrecht contacted him about hiring someone to rough up Cynthia; and the location of Cynthia's body along the route from Indianapolis to Milwaukee in its conclusion that more than sufficient evidence supported the conviction. See Albrecht, 737 N.E.2d at 733-34. While Albrecht argues that the testimony of Special Agent Craft undermined his alibi defense, it is not Special Agent Craft's testimony that is most damning to Albrecht but rather the testimony by Filter that he agreed with Albrecht to fabricate the alibi. Therefore, Albrecht has failed to demonstrate that the newly discovered evidence merits a new trial.

IV. Appropriateness of the Sentence

At the time Albrecht received his sentence from the trial court, the applicable sentencing statute read:

> (a) A person who commits murder shall be imprisoned for a fixed term of fifty-five (55) years, with not more than ten (10) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances ….

Ind. Code § 35-50-2-3 (1998) (amended in 2005 to require a sentencing range between forty-five and sixty-five years with an advisory sentence of fifty-five years). The trial court, after holding a sentencing hearing, found:

> [T]he aggravators outweigh the mitigators. That is, the Court finds that the Defendant's plan to kill his wife, to stop her happiness, to stop her leaving him, the timing of the killing immediately prior to the finalization of the divorce, the dismemberment of her body, and the collection of proceeds from her insurance policy after that far outweighs the fact that he doesn't have much of a prior criminal history or the loss to his children, who can still visit him where he'll be staying. And so the Court does believe in this case that the maximum sentence is appropriate[1] and will impose a sentence of sixty years, sixty years executed, to be served at the Department of Corrections [sic].

Transcript of Sentencing Hearing at 4502. Albrecht challenges the constitutionality of his sentence in light of the Supreme Court's opinions in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004), and our supreme court's opinion in Smylie v. State, 823 N.E.2d 679 (Ind. 2005), because the trial court enhanced his sentence on the basis of aggravating circumstances not found by a jury.

[1] The trial court appears to have been considering Albrecht's sentence in light of a prior version of the statue requiring a fixed term of fifty years with a maximum term of sixty years. See P.L. 148-1995, § 4, 1995 Ind. Acts 3068, 3069 (amending fixed term from fifty to fifty-five years and maximum term from sixty to sixty-five years).

Albrecht also asks this court to analyze his sentence in light of the nature of the offense and his character pursuant to Indiana Appellate Rule 7(B).

A. Constitutionality of the Sentence

Albrecht's arguments regarding the applicability of Blakely to his sentence have no merit because the Supreme Court decided Blakely long after Albrecht was sentenced and his appeal became final. See Hull v. State, 839 N.E.2d 1250, 1256 (Ind. Ct. App. 2005) (defendant's claims under Blakely must fail because his direct appeal was not pending at the time Blakely was decided); Smylie, 823 N.E.2d at 687 (Blakely applies to all cases pending on direct review or not yet final). Albrecht argues, however, that Apprendi was decided while his case was pending on direct review and renders his sentence invalid because it requires a jury to find any fact other than the fact of a prior conviction that increases the sentence beyond the prescribed statutory maximum. See Apprendi, 530 U.S. at 2362-63.

Initially, we point out that our supreme court did not invalidate the presumptive sentencing scheme until after the Supreme Court's decision in Blakely. See Smylie, 823 N.E.2d at 685. In so doing, our supreme court reasoned that because Blakely went beyond Apprendi in defining the term "statutory maximum" and "radically reshaped our understanding of a critical element of criminal procedure … it represents a new rule of criminal procedure." Id. at 687. Therefore, it is not certain that Apprendi alone would be enough to invalidate Albrecht's sentence on constitutional grounds. However, we need not reach the merits of that argument because Albrecht failed to challenge his sentence on direct appeal and such a failure is fatal to his claims on PCR.

A PCR is not a super appeal, and it is well established that issues that could have been raised on direct are not available in post-conviction proceedings. Woods v. State, 701 N.E.2d 1208, 1213 (Ind. 1998). Although Albrecht's failure to raise a constitutional challenge to his sentence in prediction of the Supreme Court's decision in Apprendi and/or Blakely alone does not result in the forfeiture of his claim, his failure to contest his sentence at all on direct appeal does forfeit his PCR claim. See Smylie, 823 N.E.2d at 690 ("Defendants who have appealed without raising any complaint at all about the propriety of their sentence … should be deemed to have at least forfeited, and likely waived, the issue for review."). Albrecht failed to challenge his sentence on any grounds in his direct appeal. Therefore, he has failed to preserve the constitutional issue for PCR and our subsequent review.

B. Rule 7(B) Analysis

Similarly, Albrecht did not raise the issue of the analysis of his sentence under Indiana Appellate Rule 7(B) on direct appeal, nor did he raise the issue in his petition for PCR. "Issues not raised in the petition for post-conviction relief may not be raised for the first time on post-conviction appeal." Walker v. State, 843 N.E.2d 50, 57 (Ind. Ct. App. 2006) (quoting Allen v. State, 749 N.E.2d 1158, 1171 (Ind. 2001)). Waiver notwithstanding, we cannot say that sixty years is an inappropriate sentence in light of the nature of the offense and Albrecht's character.

Pursuant to Indiana Appellate Rule 7(B), we may revise a sentence if, after due consideration of the trial court's decision, we find that the sentence "is inappropriate in light of the nature of the offense and the character of the offender." Anglemyer v. State,

868 N.E.2d 482, 490 (Ind. 2007).[2] When making this decision, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 196 (Ind. Ct. App. 2007), trans. denied.

The nature of this offense is particularly heinous because Albrecht decapitated Cynthia's body and left it lying naked in an open field. As the trial court pointed out in its sentencing statement, "under [Indiana Code section 35-50-2-9(b)(10)], dismemberment is considered an aggravating circumstance sufficient to warrant the death penalty in Indiana." Tr. of Sentencing Hearing at 4501. Pursuant to that same statute, Albrecht could have received life imprisonment without parole. In addition, Albrecht deliberately planned the murder and fabricated an alibi to attempt to cover his crime. Therefore, Albrecht's sentence is not inappropriate in light of the nature of the offense.

Although Albrecht had no criminal history prior to the murder and supported his children financially and emotionally, both of which reflect positively on his character, numerous other factors reflect negatively on his character. Albrecht was unable to accept the circumstance of his impending divorce from Cynthia and her new life without him; instead, he murdered Cynthia to prevent that new life from occurring. In addition, Albrecht attempted to draw his family and friends into his criminal plan by seeking out others to commit the crime for him or to assist him in fabricating an alibi defense. As suspicion began to focus on Albrecht, he attempted to implicate others in the murder

[2] At the time Albrecht was sentenced, Rule 7(B) did not yet exist; instead appellate review of sentences was governed by the Indiana Rules for the Appellate Review of Sentences, which inquired whether a sentence was "manifestly unreasonable in light of the nature of the offense and the character of the offender." See Bluck v. State, 716 N.E.2d 507, 515 (Ind. Ct. App. 1999). Similar language was originally adopted into Rule 7(B); however, effective January 1, 2003, Rule 7(B) was amended to require us to determine whether a sentence is "inappropriate". Polk v. State, 783 N.E.2d 1253, 1260 (Ind. Ct. App. 2003) trans. denied. "Because the rule is directed to the reviewing court, the amendment is applicable to review after January 1, 2003, even though the sentence was imposed prior to that date." Id. at 1260-61.

including his former employer. In light of these facts, we cannot say that Albrecht's sentence is inappropriate in light of his character.

Conclusion

Albrecht has failed to prove that the State knowingly used perjured testimony to secure his conviction and has waived review of the issue because he did not support it with cogent argument and citations to authority. Albrecht has also failed to demonstrate that any newly discovered evidence calling into question the honesty and credibility of Special Agent Craft meets the requirements to mandate a new trial. Finally, Albrecht has waived review of his sentencing issues because he did not raise them on direct appeal, and, in any event, his sixty-year sentence is not inappropriate. Therefore, the post-conviction court did not err when it denied Albrecht relief on his petition for PCR.

Affirmed.

CRONE, J., and BROWN, J., concur.